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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-214845 **DATE:** April 12, 1985

MATTER OF: Kenneth J. Corpman, et al. - Claim for Overtime Compensation

DIGEST:

1. Customs Service employees are entitled to overtime compensation at a higher rate under 19 U.S.C. §§ 267 and 1451 (1982) (1911/1944 Act) rather than the rate paid them under the Federal Employees Pay Act of 1945 (FEPA), if they actually performed "inspectional services" specified in the 1911/1944 Act. It is not necessary that the employees' job descriptions call for the performance of such inspectional services; nor must the employees work in a primary search area. Michael J. Murphy, Frank R. Doud, B-194568, February 15, 1980, is hereby clarified.

2. Employees of Customs Service presented sufficiently convincing evidence that they did perform "inspectional services" as specified in the 1911/1944 Act, and thus are entitled to overtime compensation at the higher rate specified under its provisions rather than the lower FEPA rate at which the agency compensated them.

This matter comes before us as a joint submission from the National Treasury Employees Union (union), and the Pacific Region, United States Customs Service, Department of the Treasury (agency). It involves the claims of four Customs Service employees, Canine Enforcement Officers Kenneth J. Corpman, Edward G. Lynch and Terry M. Neeley, and Customs Patrol Officer Charles J. George (claimants). They contend that for certain periods from May 16 through May 29, 1982, they are entitled to overtime compensation at the higher rate specified in section 5 of the Act of February 13, 1911, ch. 46, 36 Stat. 901, 19 U.S.C. § 267 (1982), as extended by the Act of June 3, 1944, ch. 233, § 1, 58 Stat. 269, codified as part of 19 U.S.C. § 1451 (1982) (the 1911/1944 Act or the statute)

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rather than that paid them under the provisions of the Federal Employees Pay Act of 1945 (FEPA), 5 U.S.C. §§ 5542 and 5546 (1982).[1/] This matter was initially the subject of an arbitration proceeding, but the parties subsequently mutually agreed, as an alternative to arbitration, to submit it to the Comptroller General. The request has been handled as a labor-relations matter under our procedures contained in 4 C.F.R. Part 22 (1984).

As further explained below, we hereby clarify Michael J. Murphy, Frank R. Doud, B-194568, February 15, 1980, our previous decision involving the application of the special overtime provisions of the 1911/1944 Act. Furthermore, we conclude that the claimants are entitled to overtime compensation at the higher rate specified under the 1911/1944 Act, rather than that paid them under the provisions of FEPA.

FACTS OF THE CASE

The claimants performed overtime work for certain periods during "Operation Horse," a Customs Service operation which included an intensified effort at interdiction of narcotics. The operation was carried out by specially assigned teams of Customs employees consisting of Customs Inspectors, Customs Patrol Officers, and Canine Enforcement Officers.

The teams served under the direction of Customs Supervisory Inspectors, and were initially intended to provide "enforcement" support only. However, the agency concedes that as the operation developed, at least the Customs Inspectors who participated did perform regular "inspectional" functions, or services, as specified in the 1911/1944 Act. They assessed and collected Customs duties, and performed other services connected with

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1/ The 1911/1944 Act provides for overtime at a rate fixed on the basis of one-half day's additional pay for each 2 hours or fraction of at least 1 hour when the overtime extends beyond 5:00 p.m. to 8:00 a.m., and 2 additional days' pay for Sunday or holiday duty. FEPA, on the other hand, provides for overtime of one and one-half times the hourly rate of basic pay.

Immigration and other regulatory requirements concerning incoming passengers. Initially, all of the Operation Horse participants were paid for overtime work under FEPA. When it was later determined by Customs management that the Inspectors who participated performed inspectional services as specified in the 1911/1944 Act, the agency decided to pay them at the higher 1911/1944 Act overtime rate. The agency, however, has refused to compensate the claimants, three Canine Enforcement Officers and a Customs Patrol Officer, at this higher rate.

CONTENTIONS OF THE PARTIES

The union contends that the claimants performed inspectional services specified in the 1911/1944 Act, as did the Inspectors, and thus are also entitled to the higher rate of compensation under that Act rather than the lower FEPA rate. In order to properly address the question of fact as to whether the claimants did or did not perform inspectional services, however, the union believes that we must overrule Michael J. Murphy, Frank R. Doud, B-194568, February 15, 1980 (Murphy) because it construes that decision as adding two qualifying requirements, as further explained below, to the 1911/1944 Act which do not appear in it. The agency contends that Murphy was correctly decided, and that since the claimants did not perform inspectional services as specified in the 1911/1944 Act, they are not entitled to 1911/1944 Act overtime, but only the lower FEPA overtime compensation which they have already received.

ANALYSIS

The provisions of the 1911/1944 Act, set out in 19 U.S.C. §§ 267, 1451 (1982), may be briefly summarized, for our purposes, as requiring the Secretary of the Treasury to fix a reasonable rate of extra compensation for certain overtime services. This extra compensation can only be earned by:

1. any Customs officer or employee

2. who performs inspectional services as specified in the statute, i.e., "services in connection with the lading or unlading of cargo [etc.],"

3. during the particular times specified.

The parties agree the claimants have fulfilled the first and third statutory requirements. Furthermore, the implementing regulations to the 1911/1944 Act provide that when the needs of the Customs Service so require, any available and competent employees can be assigned to perform services for which this extra compensation is payable, and "such employees while so assigned shall be deemed acting inspectors, acting Customs warehouse officers, etc., as the case may be." See 19 C.F.R. § 24.16(k) (1984). Thus, the only issue remaining to be resolved is a question of fact, i.e., whether the claimants did or did not perform the inspectional services as specified in the statute.

In this regard, we note that the union construes our decision in Murphy, previously cited, as adding two other elements to the 1911/1944 Act in order to be eligible for the extra compensation under it, namely, (1) a person's position description must be classified as involving "inspectional" duties rather than merely "enforcement" duties, and (2) performance of work must be in a primary search area, and thus performance of work in a secondary search area is not sufficient to qualify for 1911/1944 Act overtime. For the following reasons, we believe that the union has misconstrued the Murphy decision.

In the Murphy decision we held that Customs Service Dog Handlers were not entitled to 1911/1944 Act overtime where their assigned duties were investigative or enforcement-type duties in nature, and were not directly related to the Customs services required by law, i.e., the inspectional services as specified in the statute. See also Robert Zolczer, et al., B-197489, June 12, 1980, at 4. As to the first element mentioned above, Murphy recognized that the Customs officers' or employees' actual duties, and not their position descriptions, must consist of the inspectional services as specified in the 1911/1944 Act. Murphy merely held that the Customs Service's determination to pay overtime based on position classification when duties are not clearly inspectional (as specified in the statute) is within the discretion of the Secretary of the Treasury.

The second element mentioned above, Murphy, and Wiley v. United States, 136 Ct. Cl. 778 (1956), may have the effect of associating eligibility for 1911/1944 Act

overtime only with duties performed in the primary search areas as opposed to the secondary search area. However, this is dicta and is not controlling in view of the clear language of the statute. Accordingly, Michael J. Murphy, Frank R. Doud, B-194568, February 15, 1980, is hereby clarified.

Having thus clarified our previous decision in Murphy, we now turn to the factual issue involved here--whether the claimants did or did not perform the inspectional services specified in the 1911/1944 Act. As demonstrated by the record before us, there is significant evidence that all the claimants did perform these specified inspectional services. For example, one claimant has presented evidence that his work included the processing of people, baggage, and vehicles upon crossing the border. It also involved the processing of trucks and their cargo to effect Customs clearance, asking questions of the travelers concerning their destinations, and taking oral declarations of what the travelers are carrying in order to ascertain whether any customs duties are due. Another claimant presented similar evidence, including performance of activities such as clearing travelers and their luggage on buses through customs, taking baggage declarations and completing seizure reports where necessary, and checking the names of travelers against lists in the agency's computer.

In response, the agency emphasizes that these claimants, in its opinion, should not have been performing inspectional activities, but only "enforcement" activities. However, as demonstrated above, the key question is what duties these claimants, in fact, performed. Indeed, as noted above, the agency's own regulations provide that any Customs employee can perform services for which 1911/1944 Act overtime is payable and "such employees while so assigned shall be deemed acting inspectors, acting Customs warehouse officers, etc., as the case may be." 19 C.F.R. § 24.16(k) (1984). (Emphasis added.) Furthermore, the agency concedes that the claimants worked alongside Inspectors, physically handled baggage, and questioned passengers. Thus, we believe that the claimants have presented sufficiently convincing evidence of the work they were assigned and did perform.

We conclude, therefore, that the claimants did perform inspectional services as specified in the 1911/1944

Act, and thus are entitled to overtime compensation at the higher rate specified under its provisions. Accordingly, since it is our understanding that the agency has already compensated the claimants for their work at the FEPA rate, it should now pay the claimants the difference between the higher 1911/1944 Act rate and the lower FEPA rate for their appropriate periods of work.

Harry R. Van Cleve

for Comptroller General
of the United States